IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

THE WEITZ COMPANY, LLC, 4:04-cv-90353 Plaintiff, V. LLOYD'S OF LONDON, et al., a/k/a, UNDERWRITERS AT LLOYD'S, LEXINGTON INSURANCE COMPANY, CONTINENTAL CASUALTY INSURANCE COMPANY a/k/a CNA, ST. PAUL FIRE & MARINE INSURANCE * COMPANY a/k/a ST. PAUL TRAVELERS, * and UNITED STATES FIRE INSURANCE MEMORANDUM OPINION COMPANY, AND ORDER Defendants.

Before the Court is Defendants' Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(3) and 12(b)(6). Clerk's No. 9. Defendants, insurance providers, argue that under Rule 12(b)(6) the Plaintiff, Weitz Co. LLC ("Weitz"), has failed to state claim upon which relief can be granted because it is not specifically named in the insurance policy and, therefore, has no standing to bring this claim. Defendants also argue, under Rule 12(b)(3), that venue in the Southern District of Iowa is improper. Defendants have made no motion for venue transfer under 28 U.S.C. section 1404. Subject matter jurisdiction exists pursuant to 28 U.S.C. section 1332(a) as all parties are diverse and

the amount in controversy exceeds \$75,000. Defendants make no objection to personal jurisdiction and, therefore, any argument in that respect is now waived. A hearing on Defendants' motion was held on November 22, 2004. The matter is fully submitted.

I. INTRODUCTION

There are two questions that this Court must answer: 1) Whether Weitz has the capacity to sue Defendants under the insurance policy as either a co-insured or a third party beneficiary; and 2) If so, whether the Service of Suit clause contained in the insurance policy waives any venue objections that Defendant could have made. The Defendants issued the insurance policy in question to H. Group Holding Co. and its affiliates (collectively referred to as "Hyatt"). The insurance policy is described by Defendants as a "Global Property Policy" to cover all real and personal property of Hyatt, its subsidiaries, and affiliates. Weitz is not named specifically in the insurance policy, but maintains that under the language of the policy, it may directly submit a claim as either a co-insured or third party beneficiary.

Weitz served as the general contractor in the construction of Hyatt's Classic Residence

Aventura project in Aventura, Florida. After extensive rains, Weitz submitted an insurance claim

directly upon Defendants, which Defendants denied. The portion of the insurance policy covering the

Aventura project is described as a builder's risk policy, as stated in the certificate of insurance.

Defendants do not dispute that the policy covers the interests of contractors, such as Weitz, in the

property at issue. Defs.' Reply Br. at 1. Defendants maintain, however, that Weitz cannot sue directly,

despite the presence of the following language in the policy:

7. NEW CONSTRUCTION, ALTERATIONS and REPAIRS

This policy also covers new buildings and structures at any location while in the course of construction and when completed; additions, extensions, alterations and repairs to buildings and structures insured hereunder, including:

- (a) Materials, supplies, equipment, machinery, and apparatus therefore;
- (b) Contents of such new buildings, structures, additions and extensions;
- (c) The interest of contractors and subcontractors in such property to the extent the Insured has assumed liability therefore.

(emphasis added). Weitz argues that under this clause, it is either a co-insured or an intended third party beneficiary "to the extent the Insured has assumed liability therefore."

The insured, Hyatt, agreed to assume liability of Weitz under a separate construction agreement:

Owner shall purchase and maintain property insurance upon the entire Work at the Site to the extent of the replacement cost thereof, including items of labor and materials connected therewith, to the full insurable value thereof. This property insurance shall be written on the standard completed value form. This insurance shall include the interests of the Owner, the Owner's Representative, the Operator and each Contractor and Subcontractor in the Work. Said insurance shall insure against Fire, Flood, Earthquake, Extended Coverage, and All Risks perils. This policy of insurance may bear a deductible as determined by the Owner, provided that Owner shall be responsible for such amount. A copy of the certificate of said policy shall be delivered by the Owner or the Owner's Representative to the Contractor. The Owner, Owner's Representative, Contractor, all Subcontractors, and all Sub-subcontractors of any tier waive all rights against each other for damage caused by fire or other perils, to the extent covered by insurance provided in this Paragraph 7E.

The insurance policy and the construction agreement constitute two separate agreements. The insurance policy is an agreement between Hyatt and the Defendants, while the construction agreement is between Hyatt and Weitz. The question is whether the language of the insurance policy shows an intent by Hyatt and the Defendants to directly benefit Weitz if Hyatt assumes liability of Weitz's interests. If such intent to confer a direct benefit upon a third party is present, Weitz may maintain this suit. Additionally, if Weitz has the capacity to sue Defendants, the Court must determine if venue in the

Southern District of Iowa is proper.

II. ANALYSIS

A. 12(b)(6)– Failure to State a Claim

In addressing a motion to dismiss under Rule 12(b)(6), this Court "is constrained by a stringent standard A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no* set of facts in support of his claim which would entitle him to relief." *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 545-46 (8th Cir. 1997) (quoting *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982)) (citation omitted) (emphasis added). In addition, the complaint must be liberally construed in the light most favorable to the plaintiff and should not be dismissed simply because the court is doubtful that the plaintiff will be able to prove all of the necessary factual allegations. *See Parnes*, 122 F.3d at 546. Finally, when considering a motion to dismiss for failure to state a claim, a court must accept the facts alleged in the complaint as true. *See Cruz v. Beto*, 405 U.S. 319, 322 (1972). The Supreme Court has articulated the test as follows:

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183, 191 (1984). A motion to dismiss should be granted "only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to

relief." *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995). Therefore, under 12(b)(6) analysis, the duty of this Court is not to examine the strength of Plaintiff's claim against the Defendants, but to answer the narrow question of whether, accepting the facts alleged in the Complaint as true, Plaintiff has the capacity to sue the Defendant insurers directly. Plaintiff only has this capacity if it is a co-insured or an intended third party beneficiary of the policy.

Insurers have a right to choose who it will insure. Neubaurer v. Hostetter, 485 N.W.2d 87, 90 (Iowa 1992). The simple fact that two parties have an insurable interest in the same property does not mean that a policy covering the interests of one automatically covers the other. *Neubaurer*, 485 N.W.2d at 90 ("to the extent that defendant and her husband also had a property interest in the dwelling, it was not automatically insured under the landlord's policy"). Neubaurer concerned the rights of a tenant when a subrogation claim was brought against him by his landlord's insurer. The Iowa Supreme Court rejected the legal fiction, accepted by a variety of states, that the tenant should be considered a "co-insured" under the landlord's policy. See id. at 89 ("Cases following Sutton, however, have at least impliedly restricted the co-insurance relationship to one limited solely to the purpose of prohibiting subrogation."). The present situation is similar to the facts in *Neubaurer* in that it concerns the separate insurable interests of two parties in the same property. Unlike *Neubaurer*, the present case does not concern subrogation claims, and here Hyatt, the insured, had agreed to cover the interests of Weitz. Such distinctions are important, because as the Iowa Supreme Court stated: "If the landlords had agreed to insure the tenants' interest in the property and had failed to do so, the result might be different." Id. at 90 (citing Connor v. American Guar. and Liab. Ins. Co., 166 N.W.2d 109 (Iowa 1969)).

Defendants rely heavily on reasoning found in an Oklahoma Supreme Court case to assert that Plaintiff is not a named insured. *Travelers Ins. Co. v. Dickey*, 799 P.2d 625 (Okla. 1990). In *Dickey*, the insurer brought a subrogation action against the contractor for money it had paid out to the insured. The insurance policy at issue in the Oklahoma case included the following coverage: "Contractors' interest in property covered to the extent of the insured's liability imposed by law or assumed by written contract" *Dickey*, 799 P.2d at 628. The insurance policy here in question contains a similar clause: "The interest of contractors and subcontractors in such property to the extent the Insured has assumed liability therefore." The Oklahoma court concluded that such language does not automatically transform a contractor into a co-insured. *See id.* ("An insurer's undertaking cannot be altered or modified by an insured's agreement with a third party in the absence of the insurer's consent."). Accordingly, the construction agreement between Hyatt and Weitz, itself, does not provide Weitz with policy coverage. Accordingly, the Court concludes that Weitz is not a co-insured under the policy or under the separate construction agreement.

Since Weitz is not a co-insured, to maintain this action Weitz must successfully argue that it is a third party beneficiary to the policy. To this end, Weitz highlights that, in *Dickey*, the Oklahoma court never stated that the language found in the insurance policy did not confer any rights upon the contractor.

Rather, as we view the quoted coverage, it affords the owner indemnity for a loss on the covered premises to property in which the contractor has an interest. In case of damage either to any of the completed work for which he has not yet been paid or to any of his tools or equipment, the roofer would be protected by the policy's coverage as a third party beneficiary.

Id. Since the case dealt with an insurance company's subrogation claim against a negligent third party,

the court did not ultimately decide the question of whether the contractor was a third party beneficiary.

Id. at 630 ("negligence in allowing rain damage to penetrate into the building's interior – is not within the coverage afforded the roofer either as a co-insured or as the policy's third party beneficiary").

Accordingly, it remains to be decided if such policy language renders the Plaintiff a third party beneficiary to the insurance policy.

As stated previously, Defendants do not dispute that as a result of provision 7(c), the policy covers the interest of contractors, like Weitz, in the property at issue. Defendants do argue, however, that Weitz is only an incidental beneficiary to the policy, as opposed to an intended beneficiary who can pursue an insurance claim directly. The primary question in determining if a third party is an incidental or intended beneficiary is, "whether the contract manifests an intent to benefit a third party." *Vogan v. Hayes Appraisal Assoc., Inc.*, 588 N.W.2d 420, 423 (Iowa 1999). Additionally, the Iowa Supreme Court has adopted the following principles from the Restatement (Second) of Contracts applicable to third party cases:

- (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
 - (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
 - (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
- (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Vogan, 588 N.W.2d at 423 (citing *Tredrea v. Anesthesia & Analgesia, P.C.*, 584 N.W.2d 276, 281 (Iowa 1998) (quoting Restatement (Second) of Contracts §302 (1979))). Further, it is not required that the benefit to the third party is the only motivating cause of making the contract. *Vogan,* 588 N.W.

2d at 424. "Neither consideration from the beneficiary nor knowledge of the contract by the beneficiary is required. Nor is it necessary that the third party be identified or identifiable when the contract is made." *Giarratono v. Weitz Co., Inc.,* 147 N.W.2d 829, 831-32 (Iowa 1967) (citing *Onley v. Hutt,* 105 N.W.2d 515, 518 (Iowa 1960); *Iowa Home Mut. Cas. Co. v. Farmers Mut. Hail Ins. Co.,* 73 N.W.2d 22, 25 (Iowa 1955)); *see also Bailey v. Iowa Beef Processors, Inc.,* 213 N.W.2d 642, 645 (Iowa 1973) ("The right of a third party beneficiary was recognized even though he was not shown to have known of the contract at the time it was made."). The insurance policy in question covers a variety of Hyatt's interests, but it also specifically states, in section 7(c) that it is intended to cover "the interest of contractors and subcontractors in such property to the extent the Insured has assumed liability therefore." The certificate of insurance issued by Defendants also states that the policy includes builder's risk coverage.

Defendants also cite a State of Washington case to support the argument that Plaintiff is not a third party beneficiary. *Postlewait Constr., Inc. v. Great Am. Ins. Co.,* 720 P.2d 805 (Wash. 1986). That case concerned whether or not a lessor could recover on the insurance policy of its lessee. The Washington court concluded the lessor could not recover, but unlike the policy in question here, "the lessor, however, was not referred to in the policy, either as a named insured, a loss payee or otherwise." *Postlewait Constr., Inc.,* 720 P. 2d at 809. In the present case, coverage of the contractor's interest is specifically stated in the policy, indicating that both Defendants and Hyatt intended to benefit Weitz.

In simple terms, under the insurance policy, the Defendants are the promisors and Hyatt is the promisee. Defendants agreed to cover the interests of contractors to the extent that Hyatt agreed to

insure them. Since Hyatt agreed to cover Weitz's interests, the performance of Defendants' promise will "satisfy an obligation of the promisee to pay money to the beneficiary." The promised performance of covering the interests of contractors is of pecuniary benefit to Plaintiff and the insurance policy is so worded as to give Defendants notice that this is one of the motivating causes of obtaining the insurance. Hyatt's interests in its properties are covered by other portions of the policy. Clause 7(c) specifically covers the interest of contractors. The promisee's intent and very purpose in adding this clause was to benefit third party contractors. It is clear that Plaintiff is not a co-insured under the policy. However, accepting the facts alleged in the Complaint as true, it appears that Plaintiff is a third party beneficiary and may maintain this suit against the Defendants.

B.
$$12(b)(3)$$
 – Improper Venue

Defendants also argue that venue in the Southern District of Iowa is improper. The federal venue statute in cases of diversity jurisdiction reads:

(a) a civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a). The insurance policy in question was not negotiated or signed in Iowa and none of the Defendants or Hyatt are headquartered in Iowa. Further, the construction project that was damaged is located, not in Iowa, but in Florida. Therefore, Defendants argue that venue is improper because few to no events giving rise to the cause of action occurred in Iowa. Once a defendant raises

an objection to venue, the burden of proof is on the plaintiff to establish that the district it chose is a proper venue. *Beckley v. Auto Profit Masters, LLC,* 266 F. Supp. 2d 1001, 1003 (S.D. Iowa 2003) (citing *Cohen v. Newsweek, Inc.,* 312 F.2d 76, 78 (8th Cir. 1963)).

Venue is a creation of statutory law which determines the appropriate federal districts where a case should be heard. "Venue is a forum limitation imposed for the convenience of the parties. As a concept of convenience rather than jurisdiction it may be conferred on a court either by consent or by the failure of the defendant to make a timely objection." *United States ex rel. Rudick v. Laird*, 412 F.2d 16, 20 (2d. Cir. 1969) (citing *Concession Consultants, Inc. v. Mirisch*, 355 F.2d 369 (2d. Cir. 1966)); *see also Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979) (stating that both personal jurisdiction and venue may be waived). Weitz argues that Defendants have waived objection to venue based on a forum selection clause found in the insurance policy.

As a third party beneficiary to the insurance policy, Weitz is bound to the forum selection clause found within. *See Boatmen's First Nat. Bank of Kansas City v. American. Ins. Co.*, 1990 U.S. Dist. LEXIS 8165, *4 (W.D. Mo. 1990) ("Plaintiff is subject to the terms of the bond including the forum selection clause to the same extent as the original parties to the bond."). Likewise, Defendants, who drafted the forum selection clause, are bound to it. In general, a forum selection clause is enforceable unless it is found to be invalid or its enforcement would be unjust or unreasonable. *Beckley*, 266 F. Supp. 2d at 1004 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Marano Enters. of Kan. v. Z-Teaca Rests., L.P.*, 254 F.3d 753, 757 (8th Cir. 2001)). Additionally, the Eighth Circuit is "inclined to agree" that interpretation of a forum selection clause is a procedural question to be decided under federal law. *Rainforest Cafe Inc. v. EklecCo., L.L.C.*, 340

F.3d 544, 546 (8th Cir. 2003). However, Defendants do not argue that the forum selection clause is invalid or unenforceable, only that Weitz cannot enforce it because it is not a party to the insurance policy. As a third party beneficiary, however, Weitz is entitled to the benefits of the forum selection clause.

The forum selection clause, entitled "Service of Suit," appears twice in the policy in almost identical language. It reads as follows:

It is agreed that in the event of the failure of the insurer hereon to pay any amount claimed to be due hereunder, the insurer hereon, at the request of the insured, will submit to the jurisdiction of any court of competent jurisdiction within the United States of America and will comply with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.

It is agreed that in the event of failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States.

Such a forum selection clause is permissive in nature rather than exclusive or mandatory. *See K&V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft ("BMW")*, 314 F.3d 494, 498 (10th Cir. 2002) (distinguishing between a mandatory clause which states that jurisdiction is appropriate in only the designated forum and a permissive clause which authorizes jurisdiction in various forums). The parties agree that the forum selection clause is not exclusive, especially in light of the Insurers' right to remove actions or transfer actions. Instead the permissive nature of the clause, "will submit to the jurisdiction of a Court of competent jurisdiction within the United States," if it is to have

any meaning, acts as a waiver of venue objections. As the Southern District of Iowa is a court of competent jurisdiction, the Defendants have agreed to submit to litigation here.

Additionally, regardless of the forum selection clause, venue is proper under 28 U.S.C. 1391(a)(1) – a judicial district where any defendant resides, if all defendants reside in the same state. In cases of natural persons, the language "defendant resides" is interpreted to be the defendants domicile. *Manley v. Engram*, 755 F. 2d 1463, 1466 (11th Cir. 1985). In cases of corporations, however, "residence" is broader than merely a corporation's "domicile." "[A] defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C. §1391(c); *see also Waeltz v. Delta Pilots Retirement Plan*, 301 F.3d 804, 809 (7th Cir. 2002). None of the Defendants have challenged personal jurisdiction in the state of Iowa. Therefore, since the Defendants are corporations and are subject to personal jurisdiction in Iowa, they are all residents of the Southern District of Iowa for purposes of establishing venue and, therefore, 28 U.S.C. section 1391(a)(1) is satisfied.

III. CONCLUSION

Based on the evidence before this Court, Weitz has stated a claim upon which relief may be granted and venue is proper in the Southern District of Iowa. Since the Complaint is to be liberally construed in the light most favorable to the Plaintiff, the Court finds it is sufficient to support a claim by Weitz as a third party beneficiary to the insurance policy. Further, Defendants waived their objection to venue in the forum selection clause, and regardless, venue in this Court is proper by the terms of 1391(a)(1) itself. Accordingly, Defendants' Motion to Dismiss (Clerk's No.9) is DENIED.

IT IS SO ORDERED.

Dated this ___6th___ day of December, 2004.

ROBERT W. PRATT
U.S. DISTRICT JUDGE